Order

Michigan Supreme Court
Lansing, Michigan

March 30, 2022

Bridget M. McCormack,
Chief Justice

162092

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

WAYNE FILIZETTI, Personal Representative of the ESTATE OF AMARAH FILIZETTI and Next Friend of LAILA FILIZETTI and MELISSA FILIZETTI, and STACEY FILIZETTI,
Plaintiffs-Appellants,

v

SC: 162092
COA: 344878
Marquette CC: 16-054781-NO

GWINN AREA COMMUNITY SCHOOLS
Defendant/Cross-Plaintiff/
Cross-Defendant-Appellee,
and

WEST EDUCATIONAL LEASING, INC., d/b/a PROFESSIONAL CONTRACT MANAGEMENT,
Defendant,
and

TRACY BELUSAR, ANTHONY J. FILIZETTI, and ROBERT SOYRING,
Defendants-Appellees,
and

GWINN AREA CLEANING AND MAINTENANCE, INC.,
Defendant/Cross-Defendant/
Cross-Plaintiff.

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On January 13, 2022, the Court heard oral argument on the application for leave to appeal the August 27, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals and REMAND this case to the Marquette Circuit Court to reinstate the parts of its July 23, 2018 order that held that the stage cover and its panels were building fixtures and that questions of fact remain to be resolved by the fact-finder under the public-building exception to governmental immunity. We DENY the application for leave to appeal in all other respects, including whether the individually named defendants were grossly negligent.

Unless an exception applies, the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., provides immunity from tort liability for government agencies "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). At issue here is the public-building exception, which explains, in part:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. [MCL 691.1406].

For the public-building exception to apply, a plaintiff must show that an injury was caused by a defect or dangerous condition of the building itself. *Reardon v Dep't of Mental Health*, 430 Mich 398, 400 (1988). The exception is limited to the repair and maintenance of the public building and does not include claims of design defects. *Renny v Dep't of Transp*, 478 Mich 490, 501, 505 (2007).

This Court has consistently considered fixtures to be part of the building for purposes of the public-building exception to governmental immunity. *Velmer v Baraga Area Sch*, 430 Mich 385, 387, 394-395 (1988) (holding that a milling machine in a school metal shop class was a fixture even though it was not permanently affixed to the floor). " 'The term "fixture" necessarily implies something having a possible existence apart from realty, but which may, by annexation, be assimilated into realty.' " *Fane v Detroit Library Comm*, 465 Mich 68, 78 (2001) (citation omitted). Whether an object is a fixture depends on the facts of each case and is determined by a three-factor test. *Id*. The three factors are: "[1] annexation to the realty, either actual or constructive; [2] adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and [3] intention to make the article a permanent accession to the freehold." *Velmer*, 430 Mich at 394, quoting *Peninsular Stove Co v Young*, 247 Mich 580, 582 (1929). An object that is not attached to a building can still be a fixture under this test if there are "objective, visible facts" supporting the intention to annex it to the building. *Velmer*, 430 Mich at 394 (citation omitted).

The lower courts correctly concluded that the objective and physical facts support the finding that the object causing injury—one of two 325-pound stage cover panels—was a fixture, and that no reasonable trier of fact could conclude otherwise.[1] The panels were designed and custom-built with the sole and express purpose of preventing gym

[1] We do not agree with the dissent's attempt to distinguish the stage cover panels at issue from the milling machine in *Velmer* based on the weight of the fixtures. In *Velmer*, we merely held that the immense weight of the machine made physical attachment to the building unnecessary for purposes of constructive annexation. *Velmer* did not hold that the weight of an object is outcome-determinative, nor did it concern an object that was custom-built for a specific use in the building.

users from sustaining injuries caused by colliding with the alcove and stage they were intended to conceal. There is nothing in the record to suggest that the panels had any purpose or value beyond the purpose for which they were specifically designed and built. The design manual suggested the panels should be moved by several cooperating individuals using carts. Although the panels were removed annually to accommodate a graduation ceremony, plaintiffs have presented evidence that the school understood that it was essential to return them to their usual position attached to the stage and fastened in place after the ceremony was complete. These facts sufficiently establish that, at the time of the incident at issue, the panels were intended to be permanently annexed to the building itself. The lower courts were correct: under these facts, the panel that caused the injury was a fixture.

But the Court of Appeals majority erred by concluding that the plaintiffs alleged a noncognizable design-defect claim rather than a breach of the school's statutory duty to repair and maintain the building. In *Renny*, we recognized that "[c]entral to the definitions of 'repair' and 'maintain' is the notion of restoring or returning something . . . to a prior state or condition." *Renny*, 478 Mich at 501. When the panel fell, it had been leaned at an angle against a gym wall, instead of being secured to the wall and floor, as was its original and normal state. A reasonable jury could conclude that this constituted a "dangerous or defective condition." MCL 691.1406. The record suggests that both school officials and maintenance staff knew that, for the safety of the gym's users, the panels needed to be returned to their normal state by being reattached and bolted to the wall and floor—rather than leaning them against a wall. Thus, resecuring the panels to the wall and floor was part of the school's duty to repair and maintain the building. See *Renny*, 478 Mich at 506-507. Plaintiffs' claim falls squarely within this duty.

In the alternative, the majority explained that the dangerous or defective condition was more akin to a transitory condition, which is not actionable under *Wade v Dep't of Corrections*, 439 Mich 158, 168 (1992). This, too, is erroneous because *Wade*'s holding was premised on the plaintiff's inability to plead or articulate any defect of the public building itself that might have created the slippery condition on the cafeteria floor. *Id*. at 171. Having already concluded that the panels here were fixtures and that those fixtures allegedly caused the bodily injury resulting in death, we reject the idea that this was a transitory condition.[2]

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[2] For similar reasons, we reject defendant's argument that plaintiffs' claim fails because it is based on "negligent janitorial care." *Wade*, 439 Mich at 170. *Wade* only held that the public-building exception did not encompass negligent janitorial care in the context of a "foreign substance" on the floor that was not a part of the building itself; it did not address a situation in which negligent janitorial care created a dangerous or defective condition of the building itself. *Id*. at 161.

While plaintiffs' claim was premised on the school's failure to repair or maintain a public building, the injury was allegedly caused by the building itself, and the facts of this case support such a claim, there remain questions of fact about the public-building exception to the GTLA to be resolved by the fact-finder. As the circuit court held, there are questions of fact about whether "the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition." MCL 691.1406. The Court of Appeals erroneously concluded that summary disposition was required as to all defendants; at this stage, the GTLA does not bar plaintiffs' claims as to the liability of Gwinn Area Community Schools. Accordingly, we reverse in part and remand to the Marquette Circuit Court for further proceedings not inconsistent with this order.

ZAHRA, J. (*dissenting*).

Because the majority improperly extends governmental statutory liability for "a dangerous or defective condition of a public building" under MCL 691.1406 to encompass a dangerous or defective condition that is not part "of a public building," I must respectfully dissent.

In this case, employees of defendant Gwinn Area Community Schools began reinstalling two large panels onto a high school gymnasium wall. It was summer and school was not in session, but the high school cheerleading team was practicing at the other end of the gym. The employees, who are also named defendants, staged the panels up against the gym wall and left them unattended to retrieve hardware to complete the task. Unbeknownst to defendant employees, the cheerleading coach had left the school to retrieve her three young daughters. Since the coach returned with her children shortly after defendant employees had left the gym to retrieve hardware, she was unaware that they had been working in the gym. The children began playing near the unattached panels while the cheerleaders practiced and, tragically, a panel fell on one of the young girls, who later died from her injuries.

Under the governmental tort liability act,[3] defendants are provided immunity from tort liability if "engaged in the exercise or discharge of a governmental function."[4] There is, however, an exception to immunity in regard to public buildings:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the

[3] MCL 691.1401 *et seq*.

[4] MCL 691.1407(1).

> public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.[5]

The first sentence of the public building exception states that governmental agencies have the duty to "repair and maintain public buildings under their control . . . ." Under the unambiguous and plain language of this sentence, the duty to repair and maintain public buildings relates "to the physical condition of the premises."[6] Similarly, "the second sentence of the exception imposes liability on governmental agencies for injuries 'resulting from a dangerous or defective condition *of* a public building . . . ."[7] The Legislature's choice to use the word "of" rather than "in" evidences its intent to have the exception apply in cases where the physical condition of the public building itself caused the injury at issue, as opposed to cases in which the injury was caused by an activity or a condition in the public building.[8] This Court has explained:

> While the use of the word "of" rather than "in" may at first blush appear to present an insignificant distinction, it appears that the Legislature chose its words carefully, as the phrase is repeated later in the same paragraph. A familiar axiom of statutory construction is that when interpreting an act, every word is presumed to have force or meaning and should not be rendered surplusage.
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> The word "of" is defined as:
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> > A term denoting that form which anything proceeds; indicating origin, source, descent, and the like . . . . Associated with or connected with, usually in some casual relation, efficient, material, formal, or final. The word has been held equivalent to after; at, or belonging to; in possession of; manufactured by; residing at; from. [Black's Law Dictionary (5th ed), p 975.]

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[5] MCL 691.1406.

[6] *Reardon v Dep't of Mental Health*, 430 Mich 398, 410 (1988).

[7] *Id*.

[8] *Id*. at 411.

> Thus, the Legislature's use of the phrase "dangerous or defective condition *of* a public building" indicates that the Legislature intended that the exception apply in cases where the physical condition of the building causes injury.[9]

On the basis of this statutory interpretation, this Court held:

> [T]he duty imposed by the public building exception relates to dangers actually presented by the building itself. To hold otherwise would expand the exception beyond the scope intended by the Legislature when it enacted the immunity act. The Legislature intended to impose a duty to maintain safe public buildings, not necessarily safety *in* public buildings.[10]

This Court has affirmed this holding from *Reardon* in several subsequent cases, making it well-established precedent that the Legislature did not intend the public building exception to impose a duty to maintain safety in public buildings; rather, "[t]he legislative intent regarding application of the public building exception statute is limited to injuries occasioned by a 'dangerous or defective physical condition *of the building itself*.' "[11]

Here, the majority relies on the common law of fixtures relating to real property to conclude that defendant Gwinn Area Public Schools is not immune from liability. I acknowledge that, "[i]n some cases, a fixtures analysis will be helpful in determining whether an item outside the four walls of a building is 'of a public building.' "[12] Yet, it must also be acknowledged that Michigan's common law of fixtures may encompass many items that are not "of a public building." For example, this Court has observed that "[t]he great weight of authority in this country sustains the rule that . . . manure made on the farm by the cattle . . . , which is made from the products of the farm, and as a result of the consumption of its produce thereon, becomes a part of the realty."[13]

Looking only at the common law of fixtures, this Court has stated that

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[9] *Id*. at 408.

[10] *Id*. at 415.

[11] *Wade v Dep't of Corrections*, 439 Mich 158, 163-164 (1992) (emphasis added). See also *Renny v Dep't of Transp*, 478 Mich 490, 497 (2007); *Fane v Detroit Library Comm*, 465 Mich 68, 77 (2001); *Horace v City of Pontiac*, 456 Mich 744, 750-751 (1998); *Hickey v Zezulka*, 439 Mich 408; 422-424 (1992); *Velmer v Baraga Area Sch*, 430 Mich 385, 394 (1988).

[12] *Fane*, 465 Mich at 77.

[13] *Taylor v Newcomb*, 123 Mich 637, 638 (1900).

> [t]he question whether an object is a fixture depends on the particular facts of each case, and is to be determined by applying three *factors*:
>
> > [1] annexation to the realty, either actual or constructive; [2] adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and [3] intention to make the article a permanent accession to the freehold.[14]

"Early in the development of fixture law, annexation was the determinative factor."[15] "The courts, however, began to create exceptions to these strict rules."[16] So the common law of fixtures evolved, and "[t]he first prong of the three-prong common law test, annexation, was thereafter given less weight, and the two remaining prongs of the test were weighed more heavily."[17] Indeed, now

> there are many cases in which items which would normally be considered to be fixtures are temporarily detached when the issue is raised; and such items will probably be held to be fixtures even though there is no physical attachment at all. For example, storm windows which were detached and stored before the property was sold, or a heavy machine which had been disassembled for repairs and may not even be on the land at the time may be held to be fixtures.[18]

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[14] *Velmer*, 430 Mich at 394, citing *Kent Storage Co v Grand Rapids Lumber Co*, 239 Mich 161, 164 (1927), and quoting *Peninsular Stove Co v Young*, 247 Mich 580, 582 (1929).

[15] Squillante, *The Law Of Fixtures: Common Law And The Uniform Commercial Code—Part I: Common Law Of Fixtures*, 15 Hofstra L Rev 191, 203 (1987).

[16] *Id*. at 206.

[17] *Id*.

[18] Polston, *The Fixtures Doctrine: Was It Ever Really The Law?*, 16 Whittier L Rev 455, 476 (1995) (citations omitted). In one early example of Michigan common law following this trend, this Court held "that cut stone and structural iron belonging to the owner of a lot on which there is a partially completed building, secured by the owner for use in the erection of the building, and lying on the same and adjoining lots at the time of sale, passed by the owner's warranty deed of the lot on which the building stood." Comment and Recent Cases, *Fixtures*, 14 Yale L J 241 (1905), citing *Bryne v Werner*, 138 Mich 328 (1904).

While a fixtures analysis may sometimes be helpful in determining whether an item is "of a public building," that same analysis is decidedly unhelpful when its application contravenes the plain language of MCL 691.1406. As previously discussed in *Reardon* and its progeny, this statute makes clear that the condition must be "part of the building itself."[19] The item therefore *must* be annexed, actually or constructively, to realty.[20] This reading is entirely consistent with the Court's stated understanding that "the Legislature intended to impose a duty to maintain safe public buildings, not necessarily safety *in* public buildings."[21]

Looking at the common law of fixtures through the lens of governmental immunity, I conclude that "annexation" is best understood as a statutory requirement under MCL 691.1406 and not merely a factor. Michigan caselaw is readily harmonized under this approach. With one exception not applicable to this case, i.e., constructive annexation by massive weight,[22] this Court has never held that MCL 691.1406

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[19] See note 9 of this statement.

[20] This proposition reasonably embraces cases in which improperly annexed fixtures or fixtures that fail to remain annexed to the public building cause injury. See, e.g., *Brewer v Wyandotte*, unpublished per curiam opinion of the Court of Appeals, issued March 9, 2006 (Docket No. 257395), p 3 ("Because the guardrails in question are designed to attach securely to those bleachers, despite their ready removability, for the purpose of protecting patrons at the front of the bleachers from falling, we conclude that the trial court did not err in regarding those rails as part of the realty for purposes of invoking the public building exception to governmental immunity."). Of course, MCL 691.1406 would still require in these cases proof that "the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

[21] *Reardon*, 430 Mich at 415.

[22] See *Velmer*, 430 Mich at 396, reversing a Court of Appeals' decision that a milling machine of "some two thousand-pound weight," *Velmer v Baraga Area Sch*, 157 Mich App 489, 495 (1987), was constructively attached to the building. While the panels in this case are quite heavy at some 325 pounds apiece, they are not remotely heavy enough to be considered constructively attached to a building by weight. Indeed, the panels are not heavier than many other common household items typically not considered fixtures, such as refrigerators, pool tables, gun safes, tool chests, exercise machines, and pianos.

encompasses unattached items as part of the building itself. To hold otherwise, as the majority has, would erode the broad immunity provided to governmental agencies and impose liability beyond that for a "dangerous or defective condition of a public building" itself. Even though the panels are common-law fixtures, they were nonetheless not yet part of the building itself under MCL 691.1406 and can only be considered a dangerous or defective condition *in* a public building as opposed to a "dangerous or defective condition *of* a public building." As the Court of Appeals concluded, "[t]he dangerous or defective condition was not of the fixtures (and therefore of the public building) themselves, but of how the employees placed the fixtures while installing them."[23] Thus, "the dangerous condition posed by the panels was related to the employees' negligence while installing them, not the permanent structure or physical integrity of the building itself."[24]

For the above reasons, I would affirm the judgment of the Court of Appeals.

VIVIANO and CLEMENT, JJ., join the statement of ZAHRA, J.

[23] *Filizetti Estate v Gwinn Area Community Sch*, unpublished per curiam opinion of the Court of Appeals, issued August 27, 2020 (Docket No. 344878), p 8.

[24] *Filizetti Estate*, unpub op at 8. Under MCL 691.1407(2), defendant employees are liable only for gross negligence. The Court of Appeals concluded that "[b]ecause there was no material question of fact as to gross negligence, the trial court erred by failing to grant summary disposition under MCR 2.116(C)(7) and (10) in favor of the individual defendants." *Filizetti Estate*, unpub op at 6; see also *id*. at 2 (METER, P.J., concurring in part and dissenting in part). Plaintiffs sought to appeal this conclusion in this Court, but we declined to hear argument on this aspect of the application.